



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 23, 2011

Mr. Hyatte O. Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-03943

Dear Mr. Simmons:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412044 (DART ORR # 7904).

Dallas Area Rapid Transit ("DART") received a request for any internal investigation files pertaining to three named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the information in exhibit B is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

¹We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

Gov't Code § 552.022(a)(1). The information in exhibit B consists of four completed internal affairs investigations made by DART. The four completed internal affairs investigations are expressly public under section 552.022(a)(1). Although you raise section 552.103 of the Government Code for the completed internal affairs investigation for control number 2006-62, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 49, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, DART may not withhold the completed internal affairs investigation for control number 2006-62 pursuant to section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will consider your arguments under this exception for the four completed internal affairs investigations in attachment B. Additionally, because sections 552.101, 552.130, 552.136, and 552.137 are other laws for purposes of section 552.022(a)(1), we will also consider these sections for the information in attachment B.

We note the completed internal affairs investigation for control number 2008-46 in attachment B contains a CR-3 accident report form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by statute. Gov't Code § 552.101. Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. *See Transp. Code § 550.065*. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* §550.065(c)(4). The requestor has not provided DART with two of the three requisite pieces of information specified by the statute. Accordingly, DART must withhold the CR-3 accident report form in the internal affairs investigation for control number 2008-46 under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). DART raises section 552.108(a)(1) for the completed internal affairs investigation for control number 2006-62. We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision

No. 350 at 3-4 (1982). However, you explain the completed internal affairs investigation for control number 2006-62 relates to a pending prosecution with the Dallas County Justice of the Peace for Precinct 1. We note the completed internal affairs investigation for control number 2006-62 includes citation 296562 that was provided to the individual who was cited. Because a copy of citation 296562 has been provided to the individual who was cited, we find its release will not interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Therefore, DART may not withhold citation 296562 in the completed internal affairs investigation for control number 2006-62 under section 552.108(a)(1). Based upon your representations and our review, we conclude that release of the remaining information in the completed internal affairs investigation for control number 2006-62 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is generally applicable to the remaining information in the completed internal affairs investigation for control number 2006-62.

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of citation 296562 and basic information, DART may withhold the remaining information in the completed internal affairs investigation for control number 2006-62 under section 552.108(a)(1) of the Government Code.

Next, we address your claim under section 552.108(b)(2) of the Government Code, which provides in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(2). Section 552.108(b)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. As previously noted, a governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Furthermore,

section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). The remaining information in attachment B relates to internal affairs investigations concerning the three named individuals. You have not explained how these remaining internal affairs investigations resulted in *criminal* investigations or prosecutions. Therefore, we find you have failed to demonstrate the applicability of section 552.108(b)(2) to these investigations. Accordingly, DART may not withhold any of the remaining completed internal affairs investigations in attachment B under section 552.108(b)(2) of the Government Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Upon review, we conclude you have failed to demonstrate how any of the remaining information in attachment B is highly intimate or embarrassing. Therefore, DART may not withhold any of the remaining information in attachment B under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. You assert the remaining information in attachment B is protected under constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to any of the remaining information in attachment B. Accordingly, DART may not withhold any of the remaining information in attachment B under section 552.101 of the Government Code in conjunction with constitutional privacy.

We note section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, DART must withhold the Texas motor vehicle record information we have marked in citation 296562 and the completed internal affairs investigations for control numbers 2006-28 and 2008-46 in attachment B under section 552.130.

We note section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find DART must withhold the information we have marked in the completed internal affairs investigations for control numbers 2006-28 and 2008-46 in attachment B under section 552.136 of the Government Code.

We note section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We have marked an e-mail address in the completed internal affairs investigation for control number 2008-46 in attachment B that is not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, DART must withhold the e-mail address we have marked in the completed internal affairs investigation for control number 2008-46 in attachment B under section 552.137 of the Government Code, unless the owner consents to its disclosure.²

In summary, DART must withhold the CR-3 accident report form in the internal affairs investigation for control number 2008-46 under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code. With the exception of citation 296562 and the basic information, DART may withhold the remaining information in the completed internal affairs investigation for control number 2006-62 under section 552.108(a)(1) of the Government Code. DART must withhold the Texas motor vehicle record information we have marked in citation 296562 and the completed internal affairs investigations for control numbers 2006-28 and 2008-46 in attachment B under

²In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and license plate numbers under section 552.130, insurance policy numbers, bank account numbers, and routing numbers under section 552.136, and the e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

section 552.130. DART must withhold the information we have marked in the completed internal affairs investigations for control numbers 2006-28 and 2008-46 in attachment B under section 552.136 of the Government Code. DART must withhold the e-mail address we have marked in the completed internal affairs investigation for control number 2008-46 in attachment B under section 552.137 of the Government Code, unless the owner consents to its disclosure. The remaining information must be released to the requestor.³

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

Ref: ID# 412044

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).